

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent appeals the ALJ's findings concerning the nature and extent of claimant's disability. Respondent asks that the ALJ's finding that claimant proved no permanent impairment of her left upper extremity be affirmed but that the percentage of functional impairment for the back be reduced to 10 percent. With regard to percentage of work disability, respondent asks the Board to reduce the task loss opinions of Drs. Estivo, Stein and Flutter to 1 percent, claiming claimant could perform most, if not all, of the tasks she had previously performed during the period of time she worked after her injury and before she terminated her employment with respondent. Respondent asks that the wage loss opinion of the ALJ be affirmed. Respondent argues that claimant's work disability should be 40.25 percent, and that no work disability benefits should be awarded until after December 15, 2007, because claimant was earning 90 percent of her preinjury average weekly wage before that date.

Claimant argues her functional impairment should be revised upward. She contends Dr. Estivo's rating should be disregarded and the Board should average the opinions of Drs. Stein and Flutter to find claimant has a 24 percent permanent partial impairment to the whole body. Claimant also asks the Board to find she proved an injury to her shoulder and add Dr. Flutter's 2 percent body as a whole rating for the shoulder injury to the averaged 24 percent rating for her low back, which would increase her functional impairment to 26 percent.¹ Claimant further contends that her wage loss is 90 percent.

The issues for the Board's review are:

- (1) What is the nature and extent of claimant's functional and work disability?
- (2) What is the compensation due; that is, how should claimant's permanent partial disability award be calculated?

FINDINGS OF FACT

Claimant worked for respondent as a licensed practical nurse (LPN). On March 6, 2004, she injured her low back and left shoulder. She underwent treatment and diagnostic testing from a number of physicians. On May 23, 2006, she underwent surgery on her low back and was off work until September 21, 2006, when she was released to return to work in a light-duty capacity. Claimant worked for respondent at light duty until December 15, 2007. She testified she continued to do the same job at respondent from March 2004 through December 2007. She admitted she performed a number of tasks that physicians later indicated she could no longer perform, such as answering call lights, changing and dressing wounds, and administering medications. During that time, however, she testified

¹ Dr. Flutter rated claimant's shoulder impairment as 3 percent to the body as a whole.

she had issues with her job because her back was hurting. She said she repeatedly complained to her supervisors that she could not do the work because of the pain and her doctors' restrictions. She voluntarily quit her job at respondent because she could not do it anymore. She said she hurt too badly, and respondent would not let her work within her restrictions.

After claimant left the job at respondent, she started working for Reno County Education Cooperative (RCEC). Gina Rayburn, RCEC's business manager, testified that claimant was hired on January 3, 2008, and her termination date was July 31, 2009. She was hired as a para educator to help in the classrooms with children who have special needs. Ms. Rayburn said paras are hired as full-time employees and work 35 hours a week. When claimant started working at RCEC, she earned \$8.25 per hour, but her salary was raised to \$8.50 per hour at the beginning of the 2008-09 school year. From January 2008 through August 2008, respondent paid health insurance premiums for claimant at the rate of \$310 per month. The State of Kansas also paid into claimant's KPERS during the time she worked there.²

Claimant started work for RCEC in January 2008 and worked until the end of the school term in May 2008. Paras do not work in the summer months, and claimant did not work at RCEC in June and July 2008.

In the summer of 2008, during the school break from RCEC, claimant worked for Home Health Care Connections as an LPN taking care of pediatric patients. This was a full-time, 40-hour per week job, and she was earning \$15 per hour. She had no fringe benefits. However, she only worked there about a month or two because her back was hurting her too much.

Claimant returned to RCEC in August 2008 and worked until January 28, 2009, when she underwent a second surgery on her low back. Claimant did not return to work at RCEC after her January 2009 back surgery. Her health insurance benefits were paid by RCEC, at the rate of \$360 per month,³ through April 30, 2009. From January 2009 through April 30, 2009, respondent paid health insurance premiums for claimant in the total amount of \$1,080.

In November 2009, claimant started working for KATCO, where she works with a mentally handicapped person. She is able to perform this job within her restrictions. She is paid \$10 per hour and works 69 hours a month, which she said was about 2 to 2 1/2 hours per day. She receives no fringe benefits. She was still working for KATCO at the

² There was no evidence entered as to the amount the State of Kansas paid into claimant's KPERS plan.

³ The premium for health insurance went from \$310 per month to \$360 per month in September 2008.

time of the regular hearing, but she testified she was looking for full-time work within her restrictions.

Dr. Paul Stein first evaluated claimant on September 28, 2004. She told him she had pain in her lower back and pain, numbness and tingling radiating down her left leg. Dr. Stein's September 2004 report did not mention that claimant had any complaints related to her left shoulder.

Dr. Stein performed a physical examination of claimant's lumbar spine and lower extremities at the initial appointment, after which he thought she probably had some nerve root impingement. He recommended further tests, including flexion and extension and oblique x-rays of the low back. He assigned claimant work restrictions of no lifting more than 10 pounds and no repetitive bending and twisting of the low back.

A review of the x-rays and claimant's previous MRI scans revealed she had minimal slippage of the vertebral body of L4 on L5, although it did not move with flexion and extension. She had desiccation at L4-5. Dr. Stein recommended epidural injections and physical therapy. When the epidural injections did not provide adequate relief, Dr. Stein told her surgery was an option but suggested she lose weight first.

In February 2005, Dr. Stein ordered a myelogram and CT scan. The myelogram CT showed claimant had minimal slippage at L4-5 but did not show any nerve root impingement. At that time, Dr. Stein believed she needed a lumbar discogram. The discogram was conducted on May 9, 2005, and on May 17, 2005, Dr. Stein indicated the results were positive at L5-S1. The L4-5 level was negative. Dr. Stein referred claimant to Dr. Alan Moskowitz because claimant clearly had pathology at L4-5.

Claimant returned to Dr. Stein on May 31, 2007, for an independent medical examination requested by respondent. Dr. Moskowitz had performed a fusion in her spine at L4-5 with instrumentation on May 23, 2006. Dr. Stein reviewed her symptoms and medical history as well as a number of additional medical records, and also performed a physical examination on claimant. He found that claimant had limitations in her range of motion in the low back but did not have any definitive neurological deficit. Straight leg raising on the left was still mildly positive.

As of May 31, 2007, Dr. Stein believed claimant was at maximum medical improvement (MMI). Based on the *AMA Guides*,⁴ Dr. Stein rated claimant as having a 20 percent impairment to the body as a whole under DRE Category IV. He recommended permanent restrictions that claimant avoid lifting more than 25 pounds with any single lift up to twice a day, 15 pounds occasionally, and 10 pounds more often, but she was not to

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

do continuous lifting. He recommended that she avoid lifting below knuckle height, except for rare occasions, that she avoid repetitive bending and twisting of the low back, and that she have the opportunity to alternate walking, sitting and standing as needed.

Dr. Stein last saw claimant on April 27, 2010, for another independent medical examination at respondent's request. At that time, claimant was working part time with restrictions. She told Dr. Stein that she had undergone a second back surgery at L3-4 on January 28, 2009, followed by physical therapy, and that she was still seeing Dr. Moskowitz. She told him initially the second surgery seemed to be helpful, but as she got more active the pain became worse again. Her pain was located in her low back and radiated into her left lower extremity with occasional numbness and tingling in the left foot. Dr. Stein did not examine claimant's left shoulder. He did not recall that she had an injury to her left shoulder. He stated claimant was originally referred to him for her low back, and he just treated claimant's low back.

In his physical examination in April 2010, Dr. Stein noted claimant had difficulty walking on her toes, secondary to discomfort. She had more restricted movement in her low back than previously. She still did not have any definitive neurological deficit. Straight leg raising had no radicular findings. Dr. Stein diagnosed her with post-surgery stenosis at L3-4. He again found that she was at MMI.

Dr. Stein had previously rated claimant as having a 20 percent permanent partial impairment to her whole body. After the April 2010 examination, based on the *AMA Guides*, he added a 1 percent whole person impairment for the additional level of fusion and a 2 percent impairment for the additional surgical procedure, for an additional 3 percent impairment. Using the Combined Values Chart, the original 20 percent and the added 3 percent result in a 22 percent impairment to the body as a whole.

Dr. Stein did not change any of claimant's previous permanent restrictions. He reviewed a task list prepared by Steve Benjamin.⁵ Of the 36 unduplicated tasks on that list, he opined that claimant would be unable to perform 14 for a 41.7 percent task loss.

Dr. George Fluter, who is board certified in physical medicine and rehabilitation and who is also a board certified independent medical examiner, evaluated claimant on two occasions, both times at the request of claimant's attorney. He first examined claimant on September 13, 2007. Claimant told Dr. Fluter that she was performing her work duties in March 2004 when she developed pain and a knot in the middle of her back. She saw an occupational medicine physician and was told she had a strain injury. Because symptoms persisted, she was referred to Dr. Stein. She was treated with medications, physical

⁵ Steve Benjamin, a vocational rehabilitation consultant, met with claimant on June 1, 2010, at the request of respondent. He obtained a 15-year work history from claimant and prepared a list of 36 unduplicated tasks claimant performed during that 15 year period.

therapy, and restrictions. She underwent two epidural injections which did not help. Subsequently, in May 2006, she underwent lumbar spine surgery. She was allowed to return to work with restrictions about six months after the surgery. Claimant also told Dr. Fluter she had experienced some popping in her left shoulder with burning pain from the shoulder to the elbow.

After performing a physical examination, Dr. Fluter diagnosed claimant with low back pain, L5-S1 discopathy, status post lumbar spine surgery, and left shoulder pain with impingement. He opined that she had a permanent partial impairment to the whole body of 20 percent related to DRE Lumbosacral Category IV of the *AMA Guides* for her lumbar spine surgery. He also believed claimant had a 5 percent permanent partial impairment to her left upper extremity at the level of the shoulder for range of motion deficits, which would convert to a 3 percent impairment to the body as a whole. Combining the lumbar and upper extremity ratings would compute to a 22 percent impairment to the whole body. Dr. Fluter said he placed claimant in Category IV because she had an anterior spinal fusion at L4-5 as well as a posterolateral spinal fusion at L4-5. He said basically the spinal fusion alters the integrity of the motion segment.

Dr. Fluter recommended that claimant restrict lifting, carrying, pushing and pulling to 35 pounds occasionally and 15 pounds frequently; restrict bending, stooping and twisting to an occasional basis; and restrict activities at or above shoulder level using the left arm to an occasional basis.

Dr. Fluter saw claimant a second time on December 14, 2009. Since her last examination, claimant had undergone a second surgical procedure in January 2009. After examining claimant, Dr. Fluter's assessment was that she had low back pain with L5-S1 discopathy and probable left lower extremity radiculitis. Based on the *AMA Guides*, he believed that claimant had a permanent partial impairment to the whole body of 25 percent in accordance with DRE Lumbosacral Category V. He said the surgeries resulted in the loss of motion segment integrity, and there were also physical findings that were different from the findings in September 2007 that he felt supported the presence of radiculitis or radiculopathy. Dr. Fluter admitted he had seen no electrodiagnostic testing verifying that claimant had radiculopathy. But he said that although nerve conduction/EMG findings are preferable, he based his increase in claimant's rating on the fact that there were some sensory changes in the reflex at her left ankle and there was a size difference between her calves of about a centimeter and a half. Clinically he felt those findings supported the presence of radiculopathy. Dr. Fluter said the shoulder impairment of 3 percent to the whole body, added to the 25 percent for the back, would calculate to a whole body impairment of 27 percent.

Dr. Fluter did not address claimant's left shoulder in December 2009. As far as he could tell, there was no change in the impairment of her shoulder from his previous examination. When Dr. Fluter saw claimant in December 2009, he believed she was at MMI. He had no specific recommendations for future treatment but stated claimant was

taking pain medications and a muscle relaxant, and he felt it would be reasonable for her to continue those medications.

Dr. Fluter reviewed a task list prepared by Jerry Hardin.⁶ Of the 20 unduplicated tasks on the list, he opined that claimant was unable to perform 8 for a 40 percent task loss.

Dr. John Estivo, a board certified orthopedic surgeon, examined claimant on September 19, 2008, and May 14, 2010, both times at the request of respondent. His first examination of September 19, 2008, was for a second opinion regarding recommended lumbar spine surgery in relation to a work-related injury of March 2004.

Claimant gave Dr. Estivo a history of her injury and medical treatment, and Dr. Estivo also reviewed copies of her medical records. Dr. Estivo noted that after various treatments, claimant was referred to Dr. Stein. After treating claimant and performing diagnostic testing, Dr. Stein referred claimant to Dr. Alan Moskowitz. On May 23, 2006, claimant underwent a transforaminal lumbar interbody fusion at L4-5, posterior lateral spinal fusion at L4-5, insertion of segmental spinal instrumentation at L4-5, decompression with facetectomies and foraminotomies at L4-5, performed by Dr. Moskowitz. However, upon follow ups with Dr. Moskowitz, she was still having lumbar spine pain and some occasions of left leg pain. On September 21, 2006, she was released to return to work in a light duty capacity starting 4 hours a day, then to 6 hours a day, and then to 8 hours a day. Dr. Moskowitz found claimant to be at MMI on March 27, 2007.

By history, Dr. Estivo noted that claimant was seen by Dr. Moskowitz again on October 18, 2007. She told him she was developing more back pain and some left leg numbness, especially at work. X-rays of the lumbar spine were taken; no abnormalities were seen. An MRI of the lumbar spine done on November 7, 2007, revealed postoperative changes at L4-5 on the left. Claimant had a transforaminal epidural injection at L3-4 on the left on December 28, 2007, with no benefit. A myelogram CT scan was done on claimant on April 30, 2008. Claimant followed up with Dr. Moskowitz on June 3, 2008. He reviewed the myelogram CT scan and noted narrowing at L3-4, particularly with hyper extension. Since claimant had not responded to epidural injections, Dr. Moskowitz recommended decompression at L3-4 with extension of the fusion to the L3-4 level. Dr. Estivo was asked to give a second opinion by respondent.

Dr. Estivo said that when an individual has a spinal fusion, as claimant had in May 2006, stress is placed on the disc levels above and below the fused segment. This can accelerate degenerative changes and cause the disc to rupture. In claimant's case, this

⁶ Jerry Hardin, a personnel and human resource consultant, met with claimant on February 23, 2010, at the request of claimant's attorney. He prepared a list of 20 unduplicated work tasks that claimant had performed in the 15 years before her injury.

occurred at the L3-4 level. Dr. Estivo agreed with Dr. Moskowitz's recommendations of extending the fusion to include L3-4.

Claimant returned to see Dr. Estivo on May 14, 2010, at the request of respondent, to determine an impairment rating and to give an opinion concerning restrictions and future medical treatment. Claimant had undergone a second surgery incorporating a L3-4 fusion into the L4-5 fusion, which was performed by Dr. Moskowitz on January 28, 2009. Upon examination, claimant was found to have normal reflexes to both lower extremities. She had positive straight leg raising on the left at 50 degrees. Strength was equal in both lower extremities. Dr. Estivo found no sensory deficits or motor deficits in her lower extremities. She had a slight antalgic gait. Dr. Estivo took x-rays, which revealed a fusion extending from L3 to L5 with hardware, no translation of one vertebrae on top of the other, and no signs of instability. He diagnosed her with status post lumbar fusion at L3-4 and L4-5 using posterior instrumentation with ongoing symptoms of lumbar radiculopathy. He concluded claimant was at MMI.

Based on the *AMA Guides*, Dr. Estivo placed claimant in DRE Lumbosacral Category III for a 10 percent permanent partial impairment. He based his opinion that claimant should be in Category III rather than Category IV because he did not find any instability in her spine. He found no abnormal angulation or translation of the vertebrae. She had no instability in the flexion/extension views. Accordingly, he found she had no loss of motion segment integrity, as is needed to be placed in Category IV.

Dr. Estivo examined claimant's left shoulder on both occasions he saw her. He did not feel she required any restrictions for her left shoulder. The impairment rating Dr. Estivo gave was related to claimant's back only. When he examined claimant on September 19, 2009, and on May 14, 2010, she had full range of motion in her shoulders. She had no complaints concerning her left shoulder in May 2010, no instability in either of her shoulders, and no loss of range of motion. Accordingly, Dr. Estivo opined she would not be entitled to any type of functional impairment for her shoulder.

Dr. Estivo restricted claimant to a 20-pound lifting limit, and also said she should do no constant bending or twisting. Dr. Estivo reviewed a task list prepared by Steve Benjamin. Of the 36 unduplicated tasks on the list, Dr. Estivo opined that claimant was unable to perform 14, for a 38.9 percent task loss.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

The ALJ found that claimant had failed to prove she suffered a permanent impairment of function to her left shoulder from the March 6, 2004 accident. The Board affirms this finding. Claimant did not make any complaints of shoulder problems to Dr. Stein, and Dr. Estivo found claimant to have full range of motion in her shoulder with no instability, weakness or complaints of pain.

The ALJ then gave equal weight to the whole body functional impairment rating opinions of Drs. Stein, Flutter and Estivo for the low back injury and concluded claimant's permanent impairment of function is 19 percent. The Board agrees with and affirms this finding. All three physicians are credible experts, and the Board finds no persuasive reason to give one physician's opinion greater weight over another with respect to the functional impairment ratings to claimant's back.

The ALJ also gave equal weight to the task loss opinions of Drs. Stein, Flutter and Estivo and found claimant suffered a 40.2 percent task loss. He then averaged this

percentage of task loss with claimant's various percentages of post accident wage loss. The Board agrees with and affirms this finding. The fact that claimant returned to work for respondent post-injury and performed some of the work tasks that physicians recommended against does not necessarily mean that claimant retains the ability to perform those tasks safely and long term. Claimant voiced contemporaneous complaints about performing those tasks, and the physicians continued to advise against them.

The Board has reviewed the wage loss percentages as calculated by the ALJ. For the period of January 2008 through May 2008, the ALJ calculated claimant's fringe benefits from respondent to be \$90.46 per week. However, the ALJ divided the amount paid by respondent in 2008 for health insurance premiums for claimant, \$3,920, by 10 months, since claimant was hired on a 10-month basis. However, it appears respondent paid claimant's health insurance premiums for the entire year in 2008, or 12 months. Therefore, the amount paid in 2008 should be computed for a whole year, not just 10 months, which would compute to \$75.38 per week rather than \$90.46.⁷ This would make a small difference in claimant's percentage of wage loss for the period of time claimant worked for RCEC from January through May 2008. However, because the evidence is unclear and because it will make no difference in the calculation of claimant's award, the Board will accept and affirm this wage loss percentage as calculated by the ALJ. The Board affirms the wage loss percentages of all other time periods as calculated by the ALJ.

CONCLUSION

(1) Claimant is awarded a 19 percent functional disability. After December 15, 2007, claimant is awarded a work disability of 59.85 percent based on a task loss of 40.2 percent and a wage loss of 79.5 percent.

(2) The Board agrees with respondent that claimant's work disability should be limited to the period after December 15, 2007. The award will be modified to limit claimant's permanent partial disability compensation to her percentage of functional impairment through December 15, 2007, her last day of work for respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated August 30, 2010, is modified to limit permanent partial disability compensation to functional disability through December 15, 2007, but is otherwise affirmed.

⁷ It appears the confusion might be because Ms. Rayburn testified claimant would reimburse respondent for the amount of insurance paid by respondent for the months of June and July. However, it appears Ms. Rayburn was speaking of dental insurance, not health insurance.

Claimant is entitled to 24 weeks of temporary total disability compensation⁸ at the rate of \$439.93 per week or \$10,558.32, followed by 77.14 weeks of permanent partial disability compensation at the rate of \$439.93 per week or \$33,936.20 for a 19 percent functional disability. For the period after December 15, 2007, claimant is entitled to 17 weeks of temporary total disability compensation at the rate of \$440 per week or \$7,480, followed by permanent partial disability compensation at the rate of \$440 per week for a period of 109.15 weeks or \$48,025.48, for a 59.85 percent work disability. All compensation is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of January, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

⁸ The record is unclear as to the dates claimant was paid temporary total disability compensation, other than the period of January 28, 2009, to May 26, 2009, a period of 17 weeks. It has been stipulated that respondent paid 41 weeks of temporary total disability compensation. For that reason, in calculating claimant's award, the Board has used the figure of 24 weeks (at the benefit rate of \$439.93 per week) as the number of weeks claimant was paid temporary total disability compensation during the functional disability period while claimant was still working for respondent and earning more than 90 percent of her pre-injury average weekly wage. The 17 weeks of temporary total paid in 2009 was paid after claimant left her employment at respondent, when her benefit rate increased to \$440 per week and during the period she was eligible for work disability.